

What's in the Words

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John MorijnDo 24 Sep
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Most people wait a lifetime for a day in court. Judges, however, spend a professional lifetime dealing with people waiting for their day in court. It is therefore exceptional enough if judges need to have their own such day. It is plain worrisome when they then need to end up at the European Court of Justice on the argument that what they have available at home is no longer a proper court, meaning a judicial body previously established by law and populated by impartial and independent judges. 22 September 2020 was such a day for two veritable Polish and therefore European judges: Judge Waldemar Żurek ([C-487/19](#)) and Judge Monika Frąckowiak ([C-508/19](#)). I went to support them – and learn.

Both cases turn on recent developments regarding selection and promotion of judges in PiS-led Poland. More specifically, how to deal with a situation where PiS now controls this process through a politically captured Council for the Judiciary/neo-KRS (the National Court Register), so that only political loyalists are appointed and individuals qualified to be a (higher) judge not even considered? (The proposal by the Executive Board of the European Network of Councils for the Judiciary to [expel](#) it is awaiting COVID-postponed approval by the ENCJ general assembly.) And how, as a matter of Union law, should we deal with the situation where complaints about such selection and promotion decisions by judges are dealt with by individuals serving in a politically captured Chamber of the Supreme Court, be it the Disciplinary Chamber or the Extraordinary Control Chamber, that are therefore not legally courts?

During the hearings it was extensively discussed whether the preliminary questions were admissible, whether Article 19(1), second subparagraph TEU has direct effect, and how Article 47 Charter of Fundamental Rights of the European Union is relevant. Parties exchanged views about what the Court's [AK](#) judgment actually says (see [here](#) and [here](#) for analyses), and in what way it is a relevant precedent. The Advocate General, Tanchev, ruined his Christian (or Orthodox) Christmas by promising he will issue an Opinion in both cases on 12 January 2021. As the preliminary questions were not brought under an emergency procedure, this means that an ECJ judgment will likely arrive almost two years after the events giving rise to these cases occurred.

Rather than summarising a day of sometimes heated exchanges (see for detailed reporting [here](#), and subsequent tweets, and the thread [here](#)), I will focus on four issues. These four dawned on me while digesting a second day (see [here](#) for a report on a first day) of listening specifically to Polish government authorities in Luxembourg, and their exchanges with the lawyers of judges Waldemar Żurek and Monika Frąckowiak, the Commission and the excellent representatives of the independent [Polish Ombudsman/Commissioner for Human Rights](#). They all require breaking out of a safe

premise that things can be contained through dialogue, comparative reporting, peer reviewing etc. Even a decent link with the new budget and the Covid Recovery Funds, although crucial, will be insufficient. Listening in Luxembourg teaches us that backsliding in the EU is already happening before our eyes and should therefore be the EU institutions' immediate starting point – as Kelemen has well explained. More than a legal fight, it is a battle of and for ideas, playing out – literally – in open court.

Lesson 1: Pay (closer) attention to what autocrats actually (publicly) argue

Listening to a party argue its case in a courtroom, one intuitively filters what is said through one's own (legal) premises, particularly when Union law terms presumed to be shared principles are employed. I did the same. The first time I listened to honourable representatives of the Polish government I therefore kept wondering how one of the biggest EU Member States could put up such a baffling, and bafflingly weak defence. It was not even trying to make a decent argument. (On 8 April the Court confirmed that the defence had been irrelevant – see Case 791/19 R). I initially thought it was just putting up a (bad) show and playing for time to ensure *faits accomplis*, in the full knowledge that what was being argued makes little legal sense (and therefore that winning the case was secondary).

On 22 September 2020 the pattern was similar. In contrast to arguments tabled by the other parties, those put forward by the Polish Prosecutor General's Office and government (although formally two parties, sadly one and the same thing by now) seemed as sharply separated from conventional Union law interpretation as the COVID-plexiglass screens now separate each of the ECJ judges from one another. Yet, my thinking on what this signifies is shifting. I sense it is both more simple and more complex. Simpler, because the Polish government may actually mean what it literally says, even if as a European I have a hard time accepting and internalising that. Indeed, it has not been shy about explicitly stating its position. Consider these literal passages from the intervention of Mrs Dalkowska, the deputy minister of justice representing Poland (and, tellingly, also still a judge), that I wrote down:

“What is crucial in this case, but also what is crucial for the functioning of the whole EU legal order and the EU, what is crucial is this fundamental right of an individual to an independent and impartial court against the background of legal certainty provided by the fundamental principle of irremovability of a judge. ... The requirement of independence of judges is part of the right to fair trial. This is a basic guarantee for an individual.

...

Let me now explain the rules for appointment of judges. It is about staffing of constitutional bodies... Among Member States there is no uniform constitutional or legislative model. Judges are appointed by the President of Poland at the request of the Council of the Judiciary for an indefinite period of time. .. The act of appointment is an independent act. It completes the appointment procedure. Once it has been issued by the President it is not possible according to Polish law to undermine the status of a judge in any way or to call into question the presidential prerogative in any way. This is how this mechanism has been shaped. This is how we guarantee the independence of judges. The prerogative of the President is of a special nature. It is a personal prerogative of the head of state. The review of this procedure would only be possible if it were provided for by the Constitution of the Republic of Poland, and it is not... So it is not possible to question the status of judges of the Supreme Court... The status of a judge cannot be contested.

...

The irremovability of judges plays a constitutional role. It is of universal nature and pan-European. Also the Court of Justice has underlined the importance of the irremovability of judges.

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There is one more thing regarding the alleged politicised KRS, when it comes to any possible lack of judicial review of the resolutions of the KRS. Poland believes that judicial review is not necessary. The process does in no way infringe Article 19 TEU.

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We have heard it is a black and white system when it comes to judges. That is true. I am a judge myself. I was appointed by the President. And I enjoy the right of being irremovable, like all other judges in Poland and Europe. Now, this principle is real. ... There is no possibility to undermine the status of a judge. Neither on the basis of Polish law nor EU law. If we allowed for such a situation, we would question this very basic principle of irremovability of judges. And from this principle stems the legal certainty and the stability of judges.”

If you take this literally, as I now think it may be meant to be taken, this makes things more complex. We may be using the same words in the same context but endow them with distinct significance and connect them quite differently. It becomes clear that what the Polish government means when it discusses issues relating to the ‘rule of law’ is ‘rule by law’ (educate yourself with [this fabulous 1.5 minute video](#) by the great Sticky Tricky Law aka Dr. Joelle Grogan). More precisely, the current Polish government defends pure majoritarianism where the executive and legislative form the point of gravity in the *trias politica*, remake (all national) law and expect judges to apply (only) that. What is meant by impartiality of judges is then fulfilling a role in the context of rule by (national majoritarian) law – as an individual appointed in the service of the

executive and legislative to decide on disputes as long as it fits the (national) law of the moment. Irremovability of judges is mainly about hedging your bets for a situation where you may be voted out so that you ensure that your political affiliates still populate another part of the *trias politica* to perpetuate your vision. (And if you are lucky, as a judge you can also become the deputy minister of justice by the side at the same time).

It is a mistake to discard this rhetoric and argumentation as irrelevant. It is a publicly stated *de facto* attempt by a large Member State to re-interpret basic Union law principles, what they require and how they hang together. However starkly at odds with how Union law has been founded and interpreted so far, what is put forward is a full-fledged competing ideology dressed up in the stolen clothes of familiar legal terms. It is an ideology that is incompatible with EU rule of law in all of its elements.

Lesson 2: Protect rule of law terminology (and develop new words to describe autocratic action)

One remarkable and telling episode in the hearings, even if it will likely have zero bearing on the outcome, was this. The Polish representative, in the final round of comments in Case 487/19, said the following in reply to arguments made by the lawyers of Judge Żurek that he had effectively suffered harassment in the way he had been treated:

“I would like to draw your attention that we are before a court of law. So we should limit ourselves to legal issues and refrain from political comments. ... Political arguments have been raised by the lawyers of Judge W.Z. and by the agent for the Ombudsman, so I will allow myself to make one comment. In this context, facts, historical background and a political background are important. After the year 1990, after the fall of communism, Poland did not reform its justice system. All studies conducted on the justice system before the year 2015 and later, including the most up to date studies, show that the reforms should be continued. The trust towards the justice system in Poland is at the level of 12%, so around 80% of the Polish population believes that reforms should be continued. These reforms were commenced in 2017, and right now, what we are witnessing, and all these cases, are the result of a dispute on the organisation and the functioning and the direction that these reforms should take. .. It is not the case that judges in Poland, and especially judge W.Z. would be harassed. ... The lawyers use such terms when talking about [the individual appointed to the Extraordinary Control Chamber] ... His judgments are called so-called judgments, the neo-KRS is called quasi-KRS. Isn't this harassment, my lords, my ladies?”

Again, you could easily think of this as pure rhetoric and thin-skinned semantics. But by the tone of voice and the gestures used, as well as the fact that this was the very first issue the representative chose to address in her final word, I suggest it may well have run deeper. Not just an instrumental attempt to get rid of all the pending cases against Poland regarding judicial independence or avoid further ones (there are now four infringement cases, about 20 preliminary references pending and more than ten cases

from Poland pending in Strasbourg – see these [comprehensive graphs](#) by Professor Pech). Not even simply feeling insulted in the heat of an argument in front of an attentive crowd of top judges. It felt like a craving for acknowledgment in Luxembourg and elsewhere that what is openly pursued in Poland is not only legal but also legitimate as a matter of Union law.

We should not satisfy that craving. Because that would signify our complacency with backsliding. Finding the words to express this consistently is not so easy, however. We will need to learn how to talk about what is happening in a way that we protect our own terminology to describe and characterise all things rule of law compliant. Laurent Pech, for example, has consistently called irregularly or illegally appointed individuals serving in a function where you would normally find judges with all the concomitant qualifications and disposition “[fake judges](#)”, or “usurpers”. Other descriptions could perhaps work too (judicial imposters?). A similar challenge is describing the body these individuals then sit in, because, by definition, it is not a court. And how do you talk about what comes out of such bodies? By definition, that is not a judgment or ruling. More tricky, but keeping in mind the difficult but deeply honourable situation that judges such Waldemar Żurek and Monika Frąckowiak may already or soon find themselves in – how to characterise hybrid institutions and their outcome that are composed partly of judges, and partly not? This is how autocracy seeps in.

We need new terminology. I would suggest, however that it is important not to use “so-called” or quotation marks (“judge”, “judgment”, “court”). Both subtle qualification and negation reinforce a frame, lead to false equivalence between legal and illegal, and end up polluting our own cherished terminology linked to the rule of law. That is too much honour for autocrats, however they sell or self-perceive their story.

Lesson 3: Swiftly grasp the urgency of widening judicial non-independence in Poland

One of the most baffling elements of the hearings was a number mentioned by – of all people – the representative of the Polish government. That number was 180.000. 180 THOUSAND. That is the number of decisions that she reported have been issued by (or involving) the 570 newly neo-KRS appointed individuals since the PiS captured the selection and appointment system of in 2018. Who knows how many of these decisions were connected to Union law, but I volunteer my bank account number to receive a *Złoty* for each. Is there a better, more concrete measure of the extent of the backsliding and the urgency of dealing with it head-on as a matter of protecting Union law and those in Poland who want protection from Union law?

After this most lob-sided defence in the history of the Court, I was curious what the Commission representative would argue. After all, it had brought various infringement cases against this very Member State about the very same issue of judicial independence. It had even started an Article 7 TEU case against Poland based on that concern too. Again, I wrote down the relevant bit:

“Let me now discuss the issue of whether a breach of the requirement of independence and impartiality of a court previously established by law flowing from Article 19(1)(2) TEU may also affect the act of appointing a person to the position of judge. Here one should reiterate that the requirements ensuing from Article 19(1)(2) TEU in conjunction with Article 47 Charter are aimed at protecting the fundamental right of an individual to an effective legal protection, in this case while applying EU law. Those requirements are meant to ensure legal protection to an individual while a judge performs his judicial duties. And, if it is necessary, such a protection may occur by disregarding a ruling issued by a judge that does not meet the requirements ensuing from Article 19 TEU. In the opinion of the Commission, as long as such protection is ensured, that is – protection by disregarding that decision ensuing from the principle of primacy of EU law, it is not necessary for EU law to interfere with the act of appointing a person to a position of judge, or the legal relationship between such a judge and the country that appoints him to the position of judge. To conclude, possible infringement of the requirement of a court being previously established by law should not affect the validity of the appointment act for the [individual appointed] as judge who issued the inadmissibility decision [in the case of Waldemar Żurek] and his position in the Extraordinary Control Chamber.”

As someone who has studied Union law for some twenty-plus years now, at some level, perhaps, under normal circumstances, I could have had sympathy for the subtle distinctions drawn. They are probably based on some understanding of where EU competences end and Member States' competences begin. They may be based on an implied understanding too that this subtlety boils down to a distinction without much difference, because almost all national legal cases can likely be tied to a Union law aspect in one way or another. That means that the obligations on Polish judges linked to guaranteeing primacy of Union law will almost always, in almost each case trigger their obligation to ignore decisions by Polish non-judges if an issue is dealt with within the scope of Union law.

Yet I would humbly submit that defending rule of law red lines is not a good occasion for arguments riding on such subtleties and implicit assumptions. It seems to me a dangerously formalistic stance to take by a Guardian of the Treaties in front of the highest European Court in the context of all the other cases it has itself brought and in the face of that number that kept ringing in my ears – 180 THOUSAND.

More importantly, it won't work in practice either. Put yourself in the shoes of the courageous individuals who were seated one row back: Waldemar Żurek and Monika Frąckowiak. We can consider ourselves blessed with their courage, without which we would be a lot less wise about the state of our Union at this very moment. But we know that they are by now surrounded by at least 570 (and counting) individuals masquerading as judges. Is the Commission's suggested strategy really to wait for real judges to work around these 570 in almost every case and apply Union law based on their own obligation as a Union law judge? Where would they go to make their finding heard now that the last independent pockets of Poland's highest courts are quickly being captured if PiS gets its way? Should Ryanair open a daily Warsaw-Luxembourg

flight for Polish judges? Why not nip the problem in the bud as a matter of interpreting Union law by attempting to close off the tap of neo-KRS “judicial” appointments altogether? Why not try to argue that the 570 individuals in question are not judges that could apply Union law, cannot form courts that would comply with Union law standards and that, therefore, they and whatever they decide are a direct threat to primacy of Union law?

Waldemar Żurek and Monika Frąckowiak came to Luxembourg for protection. They were sold short here by the Commission. But to protect what greater good or legal principle? In my view, as I argued earlier, the Commission Legal Service could and should do more to operate more strategically and forcefully, now that reversing matters in Poland still seems possible if action is quickly undertaken. 570 and 180.000 are clocks quickly ticking up, not down. I hope the Court of Justice will instead solve this case from the perspective of fellow judges in Poland.

Lesson 4: Support a broadened focus, embrace the EP resolution and stand #WithWoj

The Luxembourg hearings were about judicial independence *stricto sensu*. But a fourth and final lesson to draw from them is the awareness that the current situation of partial judicial non-independence already has a multiplier effect. The European Parliament has acknowledged that EU-action with regard to Poland should be broadened to include more than just a concern with judicial independence. It should be supported in its plea, expressed in the resolution adopted by an overwhelming majority just a week ago. It should also be supported in its plea to the Commission to start more infringement proceedings against Poland, e.g. regarding the neo-KRS, and enforce Court of Justice rulings in its favour by asking for pecuniary penalties. Just two days in Luxembourg will convince anyone that PiS will not be convinced by arguments based on conventional rule of law principles while what it is attempting to do is replace them. Its calculus needs to be changed in a different way.

What we need to continue to focus on too, apart from judicial independence, is freedom of expression. One academic who deals fearlessly with the consequences of the PiS ideology for using his is Professor Wojciech Sadurski. On 2 October he will face his third trial (for reports about his first and second trial, see here and here), this time a private criminal trial brought by a captured public TV-station that feels harassed by his criticism. The petty harassment continues: like on a previous occasion, with less than 24 hours’ notice, it was rescheduled from 24 September. Sadurski is supported by many organisations and individuals in his insistence on his right. It is important to continue to sustain and build that coalition. I, for one, will continue to stand #WithWoj. Covid or not. Because his freedom is mine.

Wojciech Sadurski, Waldemar Żurek and Monika Frąckowiak each fight for Polish and European liberal democracy in their own way from within their own role. They show us that there is nothing abstract about fighting for the rule of law in the EU. It does take a

toll. But that burden can be shared. So let's chip in in that respect, and help them.

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All the best, *Max Steinbeis*

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